IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,)
Plaintiff,)
vs.)
JEFFERY D. SCOTT,)
Defendant.)
)

Case No. 4TO-S92-83 Cr.

OPPOSITION TO MOTION TO DISMISS FOR LACK OF STATE JURISDICTION

(Filed Sep. 18, 1992)

CERTIFICATION

[XXX] This document and its attachments do not contain information that is confidential under AS 12.61.110 or the name of a victim of a crime listed in AS 12.61.140.

[___] This document or an attachment contains confidential information that may be placed in a court file under an exception listed in AS 12.61.130(b). This information appears at page(s) ___. This document and its attachments do not contain the name of a victim of a crime listed in AS 12.61.140.

COMES NOW the State of Alaska, by and through Jeffrey O'Bryant, Assistant District Attorney, and enters its opposition to the defendant's motion and moves this court for an order denying the motion.

DATED at Fairbanks, Alaska, this 15th day of September, 1992.

CHARLES E. COLE
ATTORNEY GENERAL

HARRY L. DAVIS
DISTRICT ATTORNEY

By: /s/ Jeffrey O'Bryant
Jeffrey O'Bryant
Assistant District Attorney

THIS IS TO CERTIFY THAT A COPY OF THE FOREGOING IS BEING:
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_____

NAME DATE

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MEMORANDUM OF LAW

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The defendant asks this court to find that the state courts of Alaska do not have jurisdiction over the criminal conduct of non-Alaskan Natives on Indian land.

The State of Alaska has continuously exercised criminal jurisdiction over native and non-native criminal conduct on State, Federal or Indian land since its inception. All of Alaska's lands are subject to Alaska's fish and

game laws and benefit from the state's management of the resources, unless Congress dictates otherwise. Congress did dictate otherwise in *Metlakatla Indian Community, Annette Island Reserves v. Egan*, 396 U.S. 45 (1962) (state had no authority to regulate the use of fish traps on the reservation where valid federal regulations authorized by statute were controlling). This must be compared, however, with *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (under Statehood Act, state may regulate use of fish traps by Native Americans, even in the face of federal regulations authorizing such traps, where no act of Congress establishes otherwise). In *Kake*, the court said "[t]his Court has never held that states lack power to regulate the exercise of aboriginal Indian rights, such as claimed or of those based on occupancy", 396 U.S. at 76.

In short, Congress has expressly ceded jurisdiction to Alaska. Jurisdiction in the state is well-established under Public Law 83-280 and the Statehood Act. Moreover, aboriginal hunting and fishing rights of Alaska Natives, if they ever existed, were extinguished by The Alaska Native Claims Settlement Act (ANCSA).

Public Law 280 and the Statehood Act dictate that the state has jurisdiction in this case.

Congress has specifically addressed the question of state criminal jurisdiction over Native Americans in six states, including Alaska. 18 U.S.C.A. § 1162 ("P.L. 280") states:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the

areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska. . . .	All Indian country within the State, except that on Annette Islands the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.

P.L. 280 renders *Tyonek* completely irrelevant here. Alaska has criminal jurisdiction whether Indian country or not. Indeed, under the doctrine of *expressio unius est exclusio alterius*, the enumerated exception of the Annette Islands reserve conclusively establishes congressional intent to include all other Indian country within the state's criminal jurisdiction. *See Burrell v. Burrell*, 696 P.2d 157, 165 (Alaska 1984), ("It is an accepted rule of statutory construction that to include specific terms presumptively excludes those which are not enumerated.").

Congress itself clearly views hunting and fishing as within the purview of state criminal jurisdiction. Section 2(b) of P.L. 280 states "Nothing in this section shall . . . deprive any Indian or any Indian tribe, band, or

community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." 18 U.S.C.A. § 1162(b). If hunting and fishing laws did not fall within the purview of Section 2(a), Section 2(b) would not have to except those hunting and fishing rights otherwise covered by treaty or other law.

Scott does not argue that Section 2(b) – the treaty exception – applies to his situation. Nor can he: there simply is no treaty or other law that allows him or his purported tribe the right to kill cow moose out of season. *Compare Metlakatla,* 369 U.S. 45 (residents of Indian Reserve in Alaska withdrawn from P.L. 280's grant of criminal jurisdiction over fish and game by virtue of interior department regulations as authorized by 1891 law of Congress) *with Kake,* 369 U.S. 60 (1962) (Native residents of Native villages subject to state regulation of fish and game by virtue of Statehood Act and P.L. 280).

Moreover, P.L. 280 contains a parallel provision granting certain enumerated states civil jurisdiction over Indians in Indian country, now codified at 28 U.S.C.A. § 1360.[1] 28 U.S.C.A. § 1360 does not contain an exception for hunting and fishing rights governed by other law. Congress believed that hunting and fishing were governed under the section of P.L. 280 granting criminal jurisdiction.

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[1] The United States Supreme Court has held that P.L. 280's grant of civil jurisdiction is "more limited" than its grant of criminal jurisdiction. *Cabazon,* 480 U.S. at 207-08.

A federal district court recently addressed the question of P.L. 280's application to Alaska's hunting and fishing laws. In *Native Village of Tanana v. Cowper,* the plaintiff had argued, *inter alia,* that *Cabazon* precluded application of Alaska's fish and game laws to a Native American who shot a moose out of season. In its oral ruling granting partial summary judgment to the state, the court stated,

> Public Law 280 provides that Alaska has jurisdiction over offenses committed by Indians in Indian country. There is an exception to jurisdiction which would deprive an Indian or Indian tribe, band or community of a right, privilege or immunity if ordered under federal treaty agreement or statute with respect to hunting, trapping or fishing, at 1162(b). But the exception has not been shown to apply. It appears, therefore, that under Public Law 280 at 18 U.S.C. 1162, the state would have jurisdiction over fish and game offenses in and near the Village of Tanana except insofar as there may be particular areas of Indian country with some special status that this court is not aware of. *It appears that under Public Law 280, even if there is Indian country there, the state would have jurisdiction over it.*

Native Village of Tanana, Oral Ruling of the Court, at 9-10 (D.C. Alaska, Nov. 6, 1987) (Appendix A).

The court noted that its decision was governed by the United States Supreme Court decision in *Kake,* 369 U.S. 60. *Kake* involved the authority of the state to prohibit the use of fish traps throughout Alaska in the face of federal regulations permitting their use by Native people in the Native villages of Kake and Angoon. The Court first

turned its attention to Section 4 of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339, as amended by P.L. 86-70 2(a), 73 Stat. 141. 369 U.S. at 68. It concluded the provision that "the United States 'retains 'absolute jurisdiction and control' " over Indian property "does not exclude state conservation laws from appellants' fish traps." *Id.* In support, the Court quoted a portion of the legislative history of the Statehood Act:

> The State may well waive its claim to any right or title to the lands and still *have all of its political or police power with respect to the actions of people on those lands,* as long as that does not affect title to the land.

Id. at 69, (quoting Hearings Before Senate Committee on Interior and Insular Affairs on S. 50, 83d Cong., 2d Sess. 227, 283-287) (Senator Cordon) (1954) (emphasis added).

Importantly, the context of the Court's discussion concerned potential Indian title to property: the purported "Indian Country" which Scott is claiming exists here. Yet, *Kake* stands for the proposition that if Indian Country exists outside of the Metlakatla Reserve, the state, under the Statehood Act, still has "all of its political or police power with respect to the actions of the people on those lands." This holding specifically applied to enforcement of conservation laws.

The Court further supported its conclusion with a historical analysis of congressional grants to states of jurisdiction over Indians and Indian Country. It noted that "[b]y 1880. . . . a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law. . . . " *Id.* at

72. Moreover, even after the policy of assimilation was reversed, "the influence of state law increased rather than decreased." *Id.* at 73.

Finally, *Kake* found the question of state jurisdiction over conservation laws decisively answered by Public Law 280. *Id.* at 75. The court concluded,

> This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because the migratory habits of salmon, fish traps at Kake and Angoon are no merely local matter.
>
> Congress has neither authorized the use of fish traps at Kake and Angoon nor empowered the Secretary of the Interior to do so.

Id. at 76.

Similarly, here Congress has neither authorized Scott or his purported tribe to illegally possess or transport moose out of season, nor has it authorized the Secretary of the Interior to do so. Indeed, here, unlike *Kake*, the Secretary has not done so. As *Native Village of Tanana* recognized, *Cabazon* did not overrule *Kake*. *Native Village of Tanana* at 10-11. Accordingly, Scott has absolutely no basis for denying that the state has jurisdiction to try him for this crime.

ANCSA [sic] extinguished all aboriginal hunting and fishing rights.

Scott does not identify any treaty or statute as the source of his claimed right to hunt moose out of season. Presumably, because Scott apparently considers the

source of this right to spring from "Indian country," he must believe that his status as a Native American provides the requisite authority. Of course, as outlined above, state law would control even if Scott's race did generate such a privilege. In ANCSA, however, Congress extinguished any aboriginal hunting and fishing rights of Alaska Natives.

In ANCSA, congress stated its purpose as "there is an immediate need for a fair and just settlement of all claims by Natives . . . based on aboriginal land claims." 43 U.S.C.A. § 1601(a). To accomplish this, Congress awarded Alaska Natives $962,500,000 and 40,000,000 acres of land. *United States v. Atlantic Richfield,* 612 F.2d 1132, 1134 (9th Cir. 1980). In making this award, Congress stated:

> All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any *aboriginal hunting of fishing rights that may exist,* are hereby extinguished.

43 U.S.C.A. § 1603(b) (emphasis added).

ANCSA disposes of Scott's claim. Unquestionably, Congress has the paramount authority to extinguish aboriginal claims, even without compensation. *See Tee-hit-ton Indians v. United States,* 348 U.S. 272, 279-85, 288-89 (1955). As one court construing this statute concluded, "[a]boriginal fishing and hunting rights are precisely the kind of rights Congress wished to extinguished [sic]." *People of Village of Gambell v. Clark,* 746 F.2d 572, 577 (9th Cir. 1984), *rev'd on other grounds, Amoco Production Co. v. Village of Gambell,* 480 U.S. 531 (1987). *See also Atlantic Richfield,* 612 F.2d at 1134 (ANCSA "extinguished not only

the aboriginal titles of all Alaska Natives, but also every claim 'based on' aboriginal title"). In sum, notwithstanding *Tyonek*, Scott's status as non-Alaska Native does not provide a basis for his assertion of extralegal rights.

This taking of game was not authorized by any Tribe and did not occur in Indian Country.

If any cognizable claim that a non-Alaska Native may ignore state fish and game laws exists in the abstract, it does not exist here. In short, even if the Statehood Act and P.L. 280 did not grant jurisdiction to the state, and even if ANCSA had not extinguished aboriginal hunting and fishing rights, Scott could not claim the right to illegally posses or transport moose out of season. Under existing state law precedents, which this court must follow, Scott is neither a member of a tribe nor did was [sic] he in Indian country at the time of his kill.

Tyonek is not binding on this court.

This court is bound by decisions of the Alaska Supreme Court. The most recent Alaska Supreme Court precedent on Indian law issues is *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (1988). The court held that the Native Village of Stevens was not immune from suit on the basis of sovereign immunity. It applied that holding to Native Villages outside Annette

Islands generally, concluding that "Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status." *Id.* at 41.[2]

In support of this conclusion, the court found that there were no tribes in Alaska other than the Metlakatlans. *Id.* at 36. Accordingly, Scott cannot claim any tribal authority for his illegal activity. Additionally, the court quoted with approval its previous finding that "[t]here is not now and never has been an area of Alaska recognized as Indian country with one possible exception."[3] *Id.* at 35, *quoting Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901 (Alaska 1962), *rev'd in part*, 369 U.S. 45 (1962), *aff'd in part, Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

Alaska cases have noted the uniqueness of the Native Village of Tyonek. *See Native Village of Stevens*, 757 P.2d at 35 n.4 ("Tyonek is unique among Alaska villages . . . because Tyonek occupied an Executive Order Reservation at the time it adopted a constitution and bylaws under the Alaska Indian Reorganization Act"). Accordingly, under Alaska law, this court must recognize the Ninth Circuit's decision in *Tyonek* is strictly limited to its facts and the subsequent decision of the Supreme

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[2] The court noted that Villages might have sovereign immunity if they are granted local government powers on a reservation. 757 P.2d at 40. Scott has not, and cannot, make such a claim.

[3] The possible exception the *Metlakatla* court was referring to was the Moquawkie reserve of the Native Village of Tyonek. *Native Village of Stevens*, 757 P.2d at 35 n.4. Whether Annette Islands was "Indian country" is a moot point. *See* 18 U.S.C. § 1162(a); *Metlakatla*, 369 U.S. 45.

Court in *Tyonek* reversing the Ninth Circuit. This court must follow Alaska law, which acknowledges the uniqueness of the Native Village of Tyonek, but recognizes no tribal authority in Alaska other than the Metlakatlans. Under Alaska law, Scott's status as a non-Metlakatlan Alaska Native cannot create a privilege to avoid application of state fish and game laws.

DATED at Fairbanks, Alaska, this 15th day of September, 1992.

CHARLES E. COLE
ATTORNEY GENERAL

HARRY L. DAVIS
DISTRICT ATTORNEY

By: /s/ Jeffrey O'Bryant
Jeffrey O'Bryant
Assistant District
Attorney

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ORDER

This matter having come before this court, and the court being fully advised in the premises, it is hereby ORDERED that the defendant's motion to dismiss for lack of state jurisdiction is hereby DENIED.

DATED at Fairbanks, Alaska, this ___ day of September, 1992.

DISTRICT COURT JUDGE